No. 11100

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.

807 Central Building,
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PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now American Mail Line Ltd., appellee in the above entitled action, and respectfully petitions this court for a rehearing upon the grounds and for the reasons hereinafter set forth:

PRELIMINARY

This is an action by four members of the crew of the S. S. CAPILLO who were repatriated on the M. S. GRIPSHOLM to New York in December, 1943, for

war bonus during their internment ashore by the Japanese and for transportation from New York to the Pacific Coast under paragraph 2 of a Rider to the Shipping Articles of the vessel. The trial court denied recovery and this court has reversed the action of the trial court. (The Rider is reproduced verbatim in Appendix A.)

I.

NO ISSUE IS TAKEN IN THIS PETITION FOR REHEARING ON RULING OF THIS COURT THAT DECISIONS OF MARITIME WAR EMERGENCY BOARD DO NOT APPLY TO INSTANT CASE

We take no issue in this petition for rehearing with the ruling of this court that Decisions of the Maritime War Emergency Board are not controlling in this case. The trial court, upon appellee's exceptions to the original libel, which urged the applicability of such Decisions, struck all references thereto (Ap. 9, 15). Appellee has never urged the applicability of these Decisions (Ap. 81). The Decisions of the Maritime War Emergency Board were merely introduced to show that the Board "after careful" and "additional" consideration to "existing collective bargaining agreements" adopted the rule of the *then current* collective bargaining agreements on both coasts that *no war bonus* was payable during internment of a crew ashore (Ap. 280, 288; Brief of Appellee, pp. 53-55). This has been the rule throughout the war (Brief of Appellee, pp. 30-31).

II.

OCTOBER SUPPLEMENTARY AGREEMENTS DO NOT CONTEMPLATE PAYMENT OF WAR BONUS DURING INTERNMENT OF CREW ASHORE

The court holds:

> " * * * It requires no testimony to make it clear that the union agreements did not provide for the bonus during the period specifically provided in the shipping articles. * * *"

This statement means that the following language contained in both the October Supplementary Agreements of appellee with the Marine Firemen, dated October 9, 1941, and that with the Marine Cooks, dated October 10, 1941, does *not* require the payment of war bonus during internment of the crew ashore.

> "In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rate specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the *war zones defined herein.*" (Ap. 123, 114. Emphasis ours)

A considerable portion of the brief of appellee on this appeal was devoted to showing that the above quoted language from the October Supplementary Agreements did not contemplate payment of bonus during internment of the crew ashore (Brief of Appellee, pp. 38-48, inc.).

The identical quoted language is also contained in the agreement between appellee and the Sailor's Union (Ap. 266. See Appendix B).

Almost identical language is contained in the agreements between appellee and the licensed officers and between appellee and the American Communications Association Radio Operators (Ap. 259, 265, 266. Appendix B).

(For the convenience of the court we are quoting in Appendix B the exact language of *all* October Supplementary Agreements on this subject.)

As the so-called October Supplementary Agreements between appellee and the six maritime unions contemplate that *no war bonus* is payable during internment of a crew member ashore, if these Supplementary Agreements supplant the language of the second paragraph of the Rider to the Shipping Articles of the S/S Capillo this court must revise its opinion and deny appellants' recovery.

III.

QUESTIONS ON WHICH REHEARING IS SOUGHT

Appellee takes strenuous issue with two phases of the decision of this court. We believe that the following discussion will convince the court that its decision should be both *reconsidered and changed.*

Importance of Questions Involved

This case is important to the Shipping Industry—to employers and employees alike.

(1) It is believed that it is the *first* case to reach an Appellate Court on the construction of Riders to the Shipping Articles.

(2) We believe it is the *first* case to reach an Appellate Court on the question of payment of war bonus during internment of a crew ashore.

The solution of the case hinges on what the Unions and the appellee, *at the time* of its *adoption,* meant by a Rider to the Shipping Articles of the S. S. CAPILLO.*

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* The testimony is wholly uncontradicted and it is a matter of general knowledge that for years wages and working conditions have been negotiated on an industry wide basis between the employers and the unions, not on an individual vessel basis.

"Q. (By MR. AMBLER): Mr. Williams, referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did." (Ap. 134)

"Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct." (Ap. 153)

"Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? * * * A. That is correct." (Ap. 155)

"Q. (By MR. AMBLER:) Will you state whether or not all crews of all vessels of the American Mail Line, during the

The decision in this case will have a profound influence on the interpretation of Riders to Shipping Articles, which are so common at this time. This is a test case which will probably decide the rights of the entire crew of the S. S. CAPILLO (not merely the four here actually concerned) on the subject of war bonus during their internment ashore. This case will have a strong bearing on the question of payment of war bonus to crews of other vessels during their internment ashore.

We respectfully submit that the court has misconstrued the first paragraph of the Rider reading as follows:

> "The American Mail Line agrees to *pay* an emergency *war bonus* to the crew of the S. S. *Capillo,* Voyage 6, *in accordance* with *provisions* contained *in the applicable supplementary agreements in effect* between the Pacific American Shipowners' Association and the various Marine Unions." (Emphasis ours)

We respectfully submit that the court has wholly ignored paragraph 6 of the October Supplementary Agreements here involved reading as follows:

> "The provisions of this agreement shall be *effective on all voyages* shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable* by *special agreement* or *rider attached to shipping articles.*"

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period of 1940 and 41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were." (Ap. 156)

We respectfully submit the court has *wholly ignored* the last paragraph of the Rider reading as follows:

> "It is further agreed that in the event of any increase in pay, overtime or war bonus or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be *governed* by the *terms* and *effective date* of any agreement so reached." (Emphasis ours.)

IV.

ERRORS IN THE COURT'S DECISION

(a) OCTOBER SUPPLEMENTARY AGREEMENTS ARE "IN EFFECT" FROM THEIR EFFECTIVE DATE, NOT MERELY FROM THEIR DATE

The court holds that the Supplementary Agreements of appellee with Marine Firemen of October 9, 1941, and the Supplementary Agreement of appellee with the Marine Cooks dated October 10, 1941, became effective *as of their date,* not as of the date which the agreements provide as their *effective date.* The opening paragraph of the Rider is as follows:

> "The American Mail Lines agrees to *pay* an emergency *war bonus* to the crew of the S. S. Capillo, Voyage 6, in accordance with *provisions* contained in the applicable supplementary agreements *in effect* between the Pacific American Shipowners' Association and the various Marine Unions." (Ap. 31. Emphasis ours)

The court holds that these two contracts were "in effect" on October 11, 1941, the date when the Shipping Articles on the S. S. Capillo were signed, because

these two contracts were dated prior to that date. The Court says "The words 'in effect' do not mean 'hereafter to be made'."

We respectfully submit that the *date* of the Supplementary Agreements, in this instant case, is *utterly immaterial.* Whether the particular Supplementary Agreement is "in effect" depends, on the other hand, upon when the Supplementary Agreement makes the same "effective," if it contains a specific provision on the subject. *Here it does.* The two Supplementary Agreements here involved each provide as follows:

> 6. "The *provisions* of this agreement shall be *effective* on all voyages shipping articles for which were entered into *on or after* August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement *or rider attached to shipping articles."* (See Appendix B.)

The first paragraph of the Rider thus incorporated the "provisions" of "applicable" Supplementary Agreements "in effect." The "applicable" Supplementary Agreements are, of course, those dealing with *war bonuses* and other war compensation. Whether they are "in effect" on this vessel depends on the language, if any, of such applicable Supplementary Agreements on the subject of their *effective date.* In the absence of specific language on the subject the dates of the contracts would probably govern. Here, however, *all* six Supplementary Agreements contained *explicit* language as to their effective date. The construction urged by appellee has been the *practical* construction placed on the language of the Rider and

the Shipping Agreement since August, 1941, when the Rider was first adopted.

It will be recalled that the S. S. CAPILLO was the fourth vessel on which the Rider was used. These four vessels were the M. S. CROWN CITY, Articles signed August 13, 1941; S. S. COLDBROOK, Articles signed August 27, 1941; S. S. SATARTIA, Articles signed August 30, 1941 (Ap. 107). It will be observed these Articles were dated about *two months before* the October Supplementary Agreements were dated and *yet* as the October Supplementary Agreements all provided for their *retroactive* application to August 16, 1941, the crews of these three ships and, of course, the crew of the S. S. CAPILLO were paid off in accordance with increased bonus rates of the October Supplementary Agreements.

Mr. Lintner, a witness in this case, testified as follows:

> "My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in *every case* it was the *practical* application that the results and the agreements reached in connection with those riders were what the rider meant." (Ap. 98-99)

The writer of this brief has corroborated these payments to the crews of the four vessels.

We emphasize the foregoing as it illustrates the purpose of the Rider which the court's opinion vir-

tually nullified. The court's opinion requires the Supplementary Agreement to have been dated before the date of the Shipping Articles to make such agreement *effective. The actual value of this Rider is to make effective, contracts negotiated long after their date,* if the particular Supplementary Agreement, as here, provides for a *retroactive effective date.*

The problem is a practical one and we earnestly ask the court to consider it as such. The custom of attaching Riders to Shipping Articles has been common throughout the industry. The practical reason for the construction urged by the petitioner is urged below. It is not only the *practical,* but the *real* reason.

Practical Causes Necessitating Such Riders

There were six Unions represented on board the S.S. Capillo on October 11, 1941. Negotiations between the employers and the Unions had been in almost constant progress. That is a situation which was true at the time and is often true. If a vessel remained in port until all negotiations with all six Unions had been completed and contracts signed, serious delays would obviously occur. The Unions, therefore, frequently resort to Riders like the one in question which assure the crew that they will receive the same benefits as if the ship had actually remanied in port until all negotiations are completed.

While riders were not ordinarily *necessary* to make effective later agreements, here the Rider provided special compensation in the event a vessel was lost or seized through war risk. Such compensation had not

been covered before. The Rider was necessary here to insure such coverage if later Supplementary Agreements failed, as they had in the past, to do so. When the Supplementary Agreement carried full provisions for this subject they became effective.

The custom of incorporating by Rider the provisions of collective bargaining agreements *to be later made* is a relatively old one. *Jones v. United States* (D. C. Md. 1922) 284 Fed. 721; *The Howick Hall* (D. C. La. 1925) 10 F.(2d) 162. In each of these cases the Shipping Articles contained a clause purporting to make the wages set out in the Shipping Articles subject to *later change* in rates of pay. In both cases a reduction in the scale of wages shown on the Shipping Articles was subsequently made by the employer, the United States Shipping Board, by its *unilateral* action. It will be observed in the instant case that the first and last paragraphs of the Rider expressly require the *joint* action of the Unions representing the crew and Pacific American Shipowners' Association representing the employer. In respect to this last difference in the facts of the two cases cited and the instant case, the court in *The Howick Hall* case said:

> "* * * I have no doubt that, had the officers of the seamen's unions and the shipowners' association *reached an agreement,* both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitralily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality." (p. 163)

The opening paragraph of the Rider must be read

in the light of reality, the practical end to be attained and the subsequent interpretation of the parties. When agreements are finally concluded between the employers and the Unions, such agreements usually contain, as they did here, an "effective date" which in the *instant case* was August 16, 1941.

Present Decision of the Court Denies Members of Two Unions the Right To the Higher Bonus Rates of the October Supplementary Agreements.

We might also point out at this time that while *four* of the Supplementary Agreements were *dated* prior to October 11, 1941 (Ap. 114, 119, 259, 266), *two* were dated October 15, 1941, and October 16, 1941 (Ap. 265, 266). If the present interpretation of the court is right that the *dates of the Supplementary Agreements* are their *effective dates,* then the last two Supplementary Agreements would not furnish even the bonus rate for *all* the crew of the S. S. CAPILLO. The licensed engineers and radio operator covered by these last two contracts would receive a *lower* bonus rate than their shipmates although (1) these two contracts of October 15, 1941, and October 16, 1941, like the four other October Supplementary Agreements, explicitly provide that their *effective* date is retroactively fixed at August 16, 1941, and (2) the licensed engineers and radio operators on the three earlier ships having the identical Rider, received the higher bonus rates of the October Supplementary Agreements.

(b) *ALL* THE "PROVISIONS" OF THE OCTOBER SUPPLEMENTARY AGREEMENTS APPLY NOT *MERELY* TO THE BONUS RATE OF THE OCTOBER SUPPLEMENTARY AGREEMENTS.

Not only the bonus rate and the "effective" date but *all* the "provisions" of the October Supplementary Agreements are made applicable by *both* the first paragraph of the Rider and the language of the October Supplementary Agreements themselves. If there had been *no* Rider all the "provisions" of the October Supplementary Agreements by their own provisions would have been *applicable* and *effective* as *all* such agreements are made by their terms retroactively effective to August 16, 1941. If the first paragraph of the Rider drawn by the Unions is not clear as to the applicability of *all* the provisions and terms of the October Supplementary Agreements, then the language of such Supplementary Agreements themselves made subsequent to the Rider by the same Unions supplies any clarification that is needed by saying:

> "The *provisions* of this agreement shall be effective on *all voyages* * * * after August 16, 1941 or upon any voyage to which the provisions herein are made *applicable by special* agreement or *rider* attached to shipping articles." (Emphasis ours)

This paragraph emphasizes that the Unions had in mind shipping articles such as those here involved which made "applicable" later supplementary agreements. To put it in reverse fashion, the October Supplementary Agreements expressly provided that their "provisions" were to be effective on the voyage here

under discussion. It could certainly not be argued that there is any language in the Rider making such "provisions" inapplicable. On the other hand, the first and last paragraphs of the Rider *reassert* or *reiterate* the applicability of the "provisions" and "terms" of the October Supplementary Agreements.

The decision of the court holds that the war bonus *rate* of $80.00 per month provided in the October Supplementary Agreements dated October 9, 1941, and October 10, 1941, is the one applicable to appellants in the instant case, but declines to apply the accompanying "provisions" of the bonus rate. The court reasons that as the second paragraph of the Rider specifically provides for bonus to the crew during internment, it is controlling, because the October Supplementary Agreements do not specifically provide for payment of bonus to the crew while interned.

To hold as the court does that the accompanying "provisions" on war bonus in the October Supplementary Agreements are not "applicable" to this case because they contain *no* provision for payment of bonus during internment of the crew ashore is to ignore the fact that the Rider and the October Supplementary Agreements both have clauses which are clearly designed to cover the *complete field* of compensation to crews of vessels lost or interned through war risk. To illustrate the foregoing we place in parallel columns first the language of the Rider and then the language of the Supplementary Agreements:

PROVISIONS OF RIDER TO SHIPPING ARTICLES	CORRESPONDING PROVISIONS FROM OCTOBER SUPPLEMENTARY AGREEMENTS
"In the Event the Vessel and/or Crew Be Interned, Imprisoned, Hospitalized or Put Ashore Due to War Causes and for That Reason, Be Unable to Continue Their Voyage, the Company Agrees to Pay Wages and Bonus to the Date Members of the Crew Arrive in an United States Port, on the Pacific Coast: Furthermore the Company Agrees, in Such Event, to Arrange for Repatriation of Such Men to an United States Port, on the Pacific Coast. Also, That the Company Be Liable for Any Injuries Suffered by Any Crew Member Due to War Causes.	"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.
"The Company Agrees to Reimburse Each Man so Affected by the Amount of $150.00 in the Event of Loss of Personal Effects by Any Member of the Crew Due to Necessity of Abandoning the Ship Resulting From Torpedoing, Mining, Bombing, Shelling, Scuttling or Any Other War Causes, Which Results in the Ship Wreck of the Vessel.	"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00.
"The Company Also Agrees to Carry War Risk Insurance in the Amount of $2,000.00 for each Member of the Crew, Against Loss of Life as a Result of War Perils." (Ap. 36)	"War risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement." (Ap. 123-124)

under discussion. It could certainly not be argued that there is any language in the Rider making such "provisions" inapplicable. On the other hand, the first and last paragraphs of the Rider *reassert* or *reiterate* the applicability of the "provisions" and "terms" of the October Supplementary Agreements.

The decision of the court holds that the war bonus *rate* of $80.00 per month provided in the October Supplementary Agreements dated October 9, 1941, and October 10, 1941, is the one applicable to appellants in the instant case, but declines to apply the accompanying "provisions" of the bonus rate. The court reasons that as the second paragraph of the Rider specifically provides for bonus to the crew during internment, it is controlling, because the October Supplementary Agreements do not specifically provide for payment of bonus to the crew while interned.

To hold as the court does that the accompanying "provisions" on war bonus in the October Supplementary Agreements are not "applicable" to this case because they contain *no* provision for payment of bonus during internment of the crew ashore is to ignore the fact that the Rider and the October Supplementary Agreements both have clauses which are clearly designed to cover the *complete field* of compensation to crews of vessels lost or interned through war risk. To illustrate the foregoing we place in parallel columns first the language of the Rider and then the language of the Supplementary Agreements:

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"The Company Also Agrees to Carry War Risk Insurance in the Amount of $2,000.00 for each Member of the Crew, Against Loss of Life as a Result of War Perils." (Ap. 36)	"War risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement." (Ap. 123-124)

We cannot believe that this court realizes the result which will flow from the rule which the court has just laid down. Stating it bluntly, it means that a party to a collective bargaining agreement may claim the benefits of the agreement—the result of the *give and take* attendant upon collective bargaining—*without* at the same time being bound by the limitations placed thereon. This is a shocking result and cannot have been intended by the court. Bonus during internment ashore was *traded* in collective bargaining for higher bonus rates and wider bonus areas. The increased war bonus rate of $80.00 per month of the October Supplementary Agreements and the increased areas in which same is to be paid is inextricably tied in with the other provisions and terms which together make up the final negotiated agreement. The "provisions" quoted above state in detail when this *new* $80.00 bonus rate is to be paid in case of loss or seizure of the vessel due to war risk. These provisions form a part of the new $80.00 bonus rate. For the court to seize the $80.00 rate and wider bonus area of the October Supplementary Agreements and to ignore the other accompanying "provisions" is to refuse to follow the exact language of the Rider and paragraph 6 of the October Supplementary Agreements and to ignore the history of how this rate of bonus was adopted.

Rate of War Bonus and Limitations Thereon Are Parts of the Same Agreement

The record in the instant case shows that prior to August 16, 1941, Supplementary Agreements on the Pacific Coast contained *no reference to payment of war*

bonus to a crew after the loss or destruction of the vessel from war risk. (Ap. 132, 146-149). Under these circumstances upon the loss or internment of a vessel due to war risk all obligations of the owner to the crew summarily ceased. (Brief of Appellee, page 6).

In the conference called in New York, July-August, 1941, by the United States Maritime Commission and the United States Department of Labor to settle war risk compensation on a "national uniform" basis (Brief of Appellee, page 13), the Unions demanded increased rates of bonus, increased bonus areas, increased war risk insurance, and *further* demanded in the event of *loss or seizure* of the vessel through war risk, payment of wages, emergency increases, and *war bonus* until repatriation to the United States (during internment), compensation for lost effects and transportation to "port of signing on" (Ap. 209-211). Counterproposals were made by the operator offering substantial reductions in these demands. (Ap. 242-244). As a result of these negotiations a compromise was reached on August 16, 1941, in which substantial increases in rates of bonus, areas of bonus and war risk insurance were agreed upon and, *in addition,* for the *first* time, substantial compensation *after the loss or seizure of a vessel due to war risk* (but no bonus during internment). (Ap. 213-218). This agreement of August 16, 1941, was limited to licensed officers.

The following report on the contract of August 16, 1941, was distributed within a week after the making

of this contract and illustrates the final result of the negotiations:

> "The new agreement which will apply *uniformly* on all Coasts, provides for a bonus of 60% of basic wages in lieu of the present 50%; extends the war bonus area in the Pacific Ocean to the 180th Meridian instead of the 160th Meridian of East Longitude which formed the previous boundary, Voyages to Iceland or Greenland will be compensated for by a 60% bonus. Loss of personal belongings due to sinking of vessel, etc., will be compensated for up to $500. The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the *United States, but payment of bonus does not continue under such circumstances.*" (Ap. 223-226, Emphasis ours.)

Many demands of the Unions were met during the negotiations, but the demand for payment of *bonus during internment ashore and repatriation to "port of signing on"* were *not granted.* It was a *good trade* from the standpoint of the Unions. In the summer and fall of 1941 the war seemed remote and capture and internment of crews even more so. *Every seagoing member* of the Unions would benefit by higher bonus rates and more extended bonus areas. Loss of bonus during internment even in the unlikely event of capture and internment could only affect a small percentage of the membership of the Unions.

Subsequent negotiations on the Atlantic Coast with unlicensed personnel produced the same result (Ap. 231-236).

Subsequent negotiations on the Pacific Coast pro-

duced the same result for licensed and unlicensed personnel. (Brief of Appellee, pp. 22-25)

The same rule that bonus was not payable to a crew while interned ashore was followed after the war started by the Maritime War Emergency Board. (Brief of Appellee, pp. 30-31)

These facts leading up to the adoption of the Rider and the October Supplementary Agreements must be considered by the court as they formed the basis of the entire arrangement which the court is in this case called upon to interpret.

When the Rider was first presented in early August, 1941, by the Unions and first used by American Mail Line Ltd. on the articles of a vessel dated August 13, 1941, the Supplementary Agreements up to that time were entirely silent on the payment of war bonus *after* loss or capture of the vessel through war risk. The Rider therefore made elaborate provisions for same to protect the crew as the situation then existed. When new Supplementary Agreements were made, the first paragraph of the Rider contemplated that their "provisions" would be controlling where they were at variance with the Rider. The negotiations between the Unions and the operators have been emphasized to illustrate that the bonus rate and bonus area cannot be disassociated from the "provisions and terms" as to when such bonus rate should be paid. The rate and area were the result of long negotiations in which concessions were made on both sides.

We review the foregoing to show that bonus rate and bonus area cannot be disassociated from the accompanying "provisions" as to when it is to be paid.

(c) COURT HAS IGNORED LAST PARAGRAPH OF RIDER

The last paragraph of the Rider reads as follows:

> "It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in insurance, which may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be governed by the *terms* and *effective date* of any agreement so reached." (Emphasis ours)

If the court should determine, in the face of what we believe to be the overwhelming evidence to the contrary, that the first paragraph of the Rider did not make all the October Agreements controlling from August 16, 1941—their *"effective* date"—then the last paragraph of the Rider *certainly* does so.

The last paragraph of the Rider provides that in *future* agreements, if there is an "increase in pay, overtime or war bonus", its *"terms"* and "effective date" apply. Here there was a substantial increase in both the *rate* of bonus and also the *area* in which it was to be paid. The crews of the three earlier vessels received this higher bonus in the wider area as provided in the October Supplementary Agreements by virtue of the identical Rider here involved and the terms of the identical October Supplementary Agreements here involved.

In this case the employer for the *first time* has invoked the accompanying "terms" of the October Supplementary Agreements as to when the increased bonus provided in these agreements should be paid. As sug-

gested above the court has construed the Rider as a *"one way street"*. According to the ruling of the court only "provisions" and "terms" favorable to the crew are to be applied. "Provisions" and "terms" accompanying the higher bonus rate of the October Supplementary Agreements are to be *ignored* if they are unfavorable to the crew. This is manifestly neither fair, nor does it encourage confidence in collective bargaining agreements.

The October Supplementary Agreements provided a substantial *increase* in "pay, overtime or war bonus."

> "1. The rate of bonus was increased from $60.00 a month to $80.00 a month, for unlicensed personnel, such as appellants, earning under $120.00 a month (133, 116).
>
> "2. For licensed officers and unlicensed personnel earning over $120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).
>
> "3. The area in which bonus was payable in all cases was increased *from t*he crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound *to* the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).
>
> "4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).
>
> "5. Payment for lost effects of unlicensed personnel was provided at $150.00 and for licensed personnel at $500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).

"6. War risk insurance increased for all persons from $2,000.00 to $5,000.00 (114, 117, 259, 265, 266).

"It will be also recalled that basic wages for the appellants had been raised $10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269)." (Brief of Appellee,, pp. 34-35)

The first and last paragraphs of the Rider unequivocally emphasize the primary purpose thereof, which was to keep the rights of the crew of the S S. CAPILLO in line with current developments in collective bargaining.

Rider is unequivocable that "provisions" and "terms" of supplementary agreements shall apply—No saving of more favorable *existing* rights.

It has been suggested that the Unions drafting and presenting the Rider could not have intended to disturb by their Supplementary Agreements advantages or rights already protected by favorable explicit language in the Rider, i.e., such as the language on *bonus* during internment ashore. The answer is *evident* and conclusive.

When rights under existing contracts were to be preserved there has never been any difficulty in so doing and it is often done. In the instant case, for example, Decision of the National Defense Mediation Board, in case No. 80, provides in part as follows:

"Nothing in these recommendations shall be interpreted so as to reduce benefits now existing under collective bargaining contracts. Except as here-

in modified, existing contracts and arrangements shall continue." (Ap. 231)

And again, in the Statement of Principles, adopted December 17-19, 1941, it was provided:

"* * * It is understood and agreed that * * * of all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated. * * * " (Ap. 200)

It is a common practice in collective bargaining agreements to provide that a contract upon becoming effective should not lessen or diminish pre-existing rights. Such, however, was *not done* in the *instant* case. The exact *opposite* was done. Paragraph 6 of the October Supplementary Agreements *unequivocally* provided, "The provisions of this agreement shall be effective * * * ." There can be no question of the authority of the union to modify the Rider because the Rider by its own terms provides that war bonus is to be paid "in accordance with provisions contained in the applicable Supplementary Agreements in effect * * *."

AMERICAN MAIL LINE LTD. NOT OWNER OF THE S.S. "CAPILLO"

While it has no bearing on the issues of the instant case we would like to call attention to the fact that the American Mail Line Ltd. was not the owner of the CAPILLO as stated in the opening paragraph of the court's opinion. The owner of the vessel at all times has been the United States of America. The American Mail Line Ltd. was operating the vessel under bareboat charter.

CONCLUSION

We respectively submit:

1. The first paragraph of the Rider incorporates the "provisions" of the Supplementary Agreements whose effective date is prior to October 11, 1941. The mere *date* of the Supplementary Agreements is immaterial where an *effective* date is specifically given.

2. The first paragraph of the Rider and paragraph 6 of the October Supplementary Agreements plainly show that *all* of the provisions of the latter are *applicable.*

3. The October Supplementary Agreements were the result of *long negotiations* and their bonus rates are inextricably tied into the accompanying "provisions" of the October Supplementary Agreements as to *when* such bonus is to be paid. The rate of bonus, and the accompanying provisions as to when it is to be paid, form a full, integrated and uniform arrangement.

4. The language of the second, third and fourth paragraphs of the Rider are superseded by the corresponding provisions of the October Supplementary Agreements on the same subject which, on their face and by the history of negotiations, are a full, integrated and uniform arrangement covering *all* phases of the subject.

5. If the "provisions" of all October Supplementary Agreements are not incorporated by the *first* paragraph of the Rider, then their "terms and effective date" are incorporated by the *last* paragraph of the Rider as they *all* provide for substantial increases in "pay, overtime or war bonus".

We respectfully petition the court to reconsider and correct the errors in its opinion discussed above.

AMERICAN MAIL LINE LTD., Petitioner
By A. R. LINTNER, President

GROSSCUP, AMBLER & STEPHAN
JOHN AMBLER
Proctors for Petitioner

STATE OF WASHINGTON, County of King, ss.

A. R. LINTNER, being first duly sworn, on oath, deposes and says that he is President of AMERICAN MAIL LINE LTD., a corporation, the petitioner named in the foregoing Petition for Rehearing; that he executes this verification as the act and deed of said corporation for the uses and purposes therein stated, being duly authorized so to do; that he has read said Petition, knows the contents thereof and the same are true as he verily believes.

A. R. LINTNER

Subscribed and sworn to before me this 15th day of April, 1946.

INEZ M. ANNESLEY
Notary Public in and for the State of Washington, residing at Seattle.

CERTIFICATE OF COUNSEL

As counsel for AMERICAN MAIL LINE LTD., petitioner in the above Petition for Rehearing, I hereby certify that in my judgment the petition is well founded and that it is not interposed for delay.

JOHN AMBLER

APPENDIX A

RIDER TO ARTICLES

The American Mail Line agrees to pay an emergency war bonus to the crew of the S.S. CAPILLO, voyage 6, in accordance with provisions contained in the applicable supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and bonus to the date members of the crew arrive in an United States port, on the Pacific Coast: furthermore, the company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the company be liable for any injuries suffered by any crew member due to war causes.

The company agrees to reimburse each man so affected by the amount of $150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombing, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.

The company also agrees to carry war risk insurance in the amount of $2,000.00 for each member of the crew, against loss of life as a result of war perils.

It is further agreed that in the event of any increase in pay, overtime or war bonus, or changes in

insurance, which may be granted, as the result of negotiations between the union and the Pacific American Shipowners' Association, the company will be governed by the terms and effective date of any agreement so reached.

GALE T. BLUNDELL
Deputy U. S. Shipping Commissioner

K. O. DREYER
Master

APPENDIX B.

UNLICENSED PERSONNEL

Supplementary Agreement of October 10, 1941 between Marine Cooks and Stewards' Association of the Pacific Coast and Pacific American Shipowners Association provides in part as follows:

"4. War Risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

"In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00.

* * * * *

"6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941 or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (App. 119, 123, 124)

The identical language is contained in supplementary agreement dated October 9, 1941 between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association and Pacific American Shipowners Association (Ap. 114) and in the supplementary agreement dated October 9, 1941 between the Sailors' Union of the Pacific and Pacific American Shipowners Association. (App. 266)

LICENSED PERSONNEL AND STAFF OFFICERS

The supplementary agreement of October 10, 1941 between National Organization of Masters, Mates and Pilots of America and Pacific American Shipowners Association provides in part as follows:

> "(3) In the event of loss of personal effects by any licensed officer, due to the necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, each licensed officer so affected shall be reimbursed by a sum not to exceed $500;
>
> "(4) In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date that members of the crew arrive in Continental United States ports and the employees shall be repatriated to a Continental United States port.
>
> "While employees are in the war zone areas described herein war bonuses shall also be paid to them at the rate of 66 2/3% of the said basic wages in Areas I to V inclusive, and 25% in Area VI.

"(5) War risk insurance of $5,000 shall be furnished each Licensed Officer on voyages described in the above danger areas; such policy shall provide for the payment of the said sum of $5,000 to the estate or designated beneficiary of such Licensed Officer in case of death due to war conditions or the payment of said sum to the Licensed Officer himself in the event of his total and permanent disability due to such war conditions, and shall provide for payment of any sum less than $5,000 to which such Licensed Officer may be entitled for injury less than total or permanent disability resulting from said war conditions. Such policies shall be made available for inspection at the offices of the respective companies." (Ap. 263-265)

The identical language is contained in the supplementary agreements between the Marine Engineers' Beneficial Association and the American Communications Association and Pacific American Shipowners Association (Ap. 265, 266).

The language of the court's opinion in the instant case suggests that the supplementary agreements of October 9, 1941, between appellee and the Marine Firemen and the supplementary agreement of October 10, 1941, between appellee and the Marine Cooks are not identical in respect to the language first above quoted.

In preparing the Apostles on Appeal at the request of the Proctor for appellants, to shorten the record only two supplementary agreements were printed in full, to-wit,

Supplementary Agreement of October 10, 1941, between appellee and Marine Cooks (Exhibit A-4, Ap. 119); and

Supplementary Agreement of October 10, 1941, between appellee and Masters, Mates and Pilots (Exhibit A-4, Ap. 259).

In the case of the two agreements of October 9, 1941, (Exhibit A-4, A-8, Ap. 114, 266), between appellee and the Marine Firemen and the Sailors' Union only that part of the agreement which differed from the agreement with the Marine Cooks (Exhibit A-4, Ap. 119) was printed.

So also in the case of the licensed officers and staff officers, only that part of the supplementary agreements of October 15, 1941, and October 16, 1941, between the appellee and the Marine Engineers and between the appellee and the American Communications (radio operator) was printed which differed from the supplementary agreement with the Masters, Mates and Pilots (Exhibit A-6, Ap. 265; Exhibit A-7, Ap. 266).

The identical portion of these latter four supplementary agreements was not reproduced.

A statement to this effect is contained in the stipulation concerning the exhibits following the provisions for omitting certain portions of the various exhibits. The language of the stipulation is as follows:

> "The omitted portions being a duplication of the corresponding portions of the contracts covering unlicensed and licensed personnel, respectively." (Ap. 73- 74.)

Brief of appellee, on pages 52 and 53, corrects a confusion created by statements contained in appellants' brief to the effect that the provisions of the October

Supplementary Agreements covering Marine Cooks, Marine Firemen and Sailors were not identical.

Counsel for appellant upon having the error in his brief called to his attention under date of October 20, 1945, immediately wrote to the Clerk of this court corroborating the statement above made that the supplementary agreements with the Marine Cooks and Marine Firemen were identical (Exhibits A-3 and A-4) in containing the language quoted above.